IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

TRIAL BRIEF OF DEFENDANTS TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON POULTRY, INC., COBB-VANTRESS, INC. , SIMMONS FOODS., INC. , CAL-MAINE FOODS, INC., GEORGE'S, INC. AND GEORGE'S FARMS, INC.

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Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Cal-Maine Foods, Inc., George's, Inc. and George's Farms, Inc. respectfully submit this brief analyzing some of the remaining legal issues to be resolved at trial.

There are many potential disputes remaining in this case. At this point it is uncertain whether the State will raise all of them at trial. To avoid an unnecessary burden on the Court, this brief does not attempt to analyze every potential issue that may arise. Should the need for additional briefing on legal issues arise during the course of trial, Defendants will submit briefs addressing those issues.

This brief addresses issues that are common to all of the State's remaining claims and then turns to issues unique to each claim.

I. Issues Applicable to All Claims

There are a number of legal issues that apply to all of the State's remaining claims.

A. Oklahoma Authorizes and Regulates the Land Application of Poultry Litter on a Field-Specific Basis

The State of Oklahoma specifically authorizes and regulates the land application of poultry litter by issuing Animal Waste Management Plans ("AWMPs"). *See* 12 Okla. Stat. § 10-9.1, *et seq.* Oklahoma requires all poultry feeding operations to have such a plan, and requires litter to be applied pursuant to such a plan. *See* 2 Okla. Stat. §§ 10-9.7(C), 10-9.19(a); Okla. Admin. Code § 35:17-5-3(b). Any farmer who applies poultry litter in violation of an AWMP is subject to serious civil and criminal penalties.[1] *See* 2 Okla. Stat. §§ 10-9.11, 10-9.12.

The evidence will show that AWMPs are drafted by agents of the State hired under a

[1] Because the State seeks to apply punitive civil sanctions under Oklahoma's general pollution statutes, the rule of lenity applies. *See NOW v. Scheidler*, 510 U.S. 249, 262 (1994). Under the rule of lenity, the Court must resolve all statutory ambiguities in favor of Defendants. *E.g.*, *United States v. Granderson*, 511 U.S. 39, 54 (1994); *Crandon v. United States*, 494 U.S. 152,

specific mandate of state law. *See* Okla. Admin. Code § 35:17-5-3(b)(3). The evidence will also show that each AWMP is submitted to the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") for approval. AWMP plan writers are charged to draft a plans that satisfy Oklahoma law and "ensure that the … [d]ischarge or runoff of waste from [each particular] application site is prohibited." 2 Okla. Stat. § 10-9.7(C)(6)(c). Accordingly, each AWMP establishes litter application rates based on the specific characteristics of an individual field, including factors such as that field's slope, soil depth, rockiness, proximity to water, and existing soil nutrient content. The plans incorporate the Best Management Practices that farmers must follow. These Best Management Practices include a number of specific requirements to prevent pollution, such as a prohibition on applying poultry litter on frozen soils or next to a stream, fissure or sinkhole. *See*, e.g., 2 Okla. Stat. §§ 10-9.7(B)(4), (C)(5), (C)(6)(c); Okla. Admin. Code § 35:17-5-3(b)(6), (7) & 17-5-5.

The evidence will demonstrate that AWMP plan writers follow these instructions and draft plans to avoid runoff of pollution to waters of the State. Moreover, the evidence will show that the State instructs farmers that AWMPs are designed to avoid runoff of pollution and that the plans contain the calculations and assumptions necessary to determine appropriate land application rates. The evidence will also demonstrate that farmers and ranchers rely on their state-issued AWMPs to ensure compliance with all relevant applicable federal, state, and local laws and regulations, and therefore the people who apply litter in the IRW do not intend to commit the intentional torts of trespass or nuisance.

The State lacks evidence that the AWMPs have been violated on any meaningful scale. The evidence will show that the State has identified a few isolated events where an individual

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159 (1990); *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *see also* Dkts. 2057, 2254, 2552, & 2606.

stored or applied poultry litter in a manner that violated an AWMP and its accompanying Best Management Practices. But this handful of small violations is unconnected to any harm in the watershed. The evidence will show that the State even went so far as to hire a large number of off-duty police officers to scour the IRW for violations of AWMPs, but this effort showed that the AWMPs were being followed.

Accordingly, at trial the State will attempt to disavow or minimize its comprehensive poultry litter regulations and the AWMPs they produce. The State will argue that it is doing a poor job of writing, authorizing and enforcing the AWMPs, and that this Court should substitute its own judgment for that of the State's plan-writers.[2] Also, the State and the Defendants will argue at trial about whether the AWMPs are "permits." Regardless of these arguments, one thing is clear. At a minimum, the AWMPs that have been issued are legal authorizations to do the acts that the AWMPs tell the farmers to do. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001). If an AWMP tells a farmer that a particular field can receive a certain amount of poultry litter at a certain time so long as the litter is applied in a certain way (for example, not near a stream or sinkhole), the farmer has authorization to follow the AWMP's instructions. To conclude otherwise would be fundamentally unfair and would violate the basic due process rights of the Oklahoma farmers and ranchers who rely on these AWMPs and the instructions they contain. *See United States v. Nat'l Dairy Prods. Corp.*, 372

[2] If the State continues to argue that State regulations are ineffective and State officials are doing a bad job of writing and enforcing AWMPs, the State will bear the burden of proof to overcome the strong legal presumption that State officials perform their duties. *See Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (a presumption of regularity applies to "official acts of public officers" allowing court, "[i]n the absence of clear evidence to the contrary," to "presume[] that public officers have properly discharged their official duties") (citing *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)); *Utah Envtl. Cong. v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007) ("presumption of regularity … is especially strong where … the challenged decision[] involve[s] technical or scientific matters within the agency's area of expertise" (internal quotations omitted)).

U.S. 29, 32-33 (1963).

The State's evidence (or lack thereof) of widespread AWMP violations is a critical issue in this case because compliance with State-approved AWMPs establishes a legal threshold for liability under each of the State's claims. The State must show that Defendants or the farmers who contract with Defendants ("Contract Growers") violate their AWMPs and that these violations caused injury in order to prevail. For a number of reasons, it is insufficient for the State to show generally that there is a lot of poultry litter applied in the IRW in compliance with AWMPs, or that poultry litter generally contains phosphorus compounds and bacteria.

First, the State has made clear that its nuisance and trespass claims are intentional torts. *See* Dkt. No. 2171 at 25 (June 5, 2009) (distinguishing negligence cases from "State's intentional tort claims"); Dkt. No. 1215 at ¶¶43, 47-57, 98, 101, 109-12, 114, 120 (July 16, 2007) (Second Amended Complaint) (alleging intentional and knowing nuisance and trespass). Because the State provides instructions to the individuals who apply litter and tells them how their task must be done on each field, complying with the State's instructions negates any suggestion that these individuals have committed an intentional tort against the State.[3] After all, the farmers and litter

[3] *See* Restatement (Second) of Torts §892A cmt. a ("[N]o one suffers a legal wrong as the result of an act to which, unaffected by fraud, mistake or duress, he freely consents or to which he manifests apparent consent. . . . This principle is expressed in the ancient legal maxim, *volenti non fit injuria*, meaning that no wrong is done to one who consents"); *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 526 (6th Cir. 2007) ("[A] plaintiff who consents to another's conduct may not assert a tort claim for harm resulting from that conduct"); *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 594 (Mich. 2000) ("Under tort law principles, a person who consents to another's conduct cannot bring a tort claim for the harm that follows from that conduct. Restatement, § 892A(1). This is because no wrong is done to one who consents"); *Prell Hotel Corp. v. Antonacci*, 469 P.2d 399, 401 (Nev. 1970) ("Consent negates the existence of the tort and, therefore, denies liability"); *Harris v. Leader*, 231 Ga.App. 709, 710 (Ga. Ct. App. 1998); *Larrimore v. Homeopathic Hospital Ass'n of Del.*, 176 A.2d 362, 368 (Del.Super. 1961) ("Consent generally prevents the actor's conduct from being tortious and therefore prevents him from being liable to the person who has given his consent to the invasion of his interest").

applicators were only doing what the State told them to do. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1219 (10th Cir. 2003) ("'If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact'") (quoting Restatement (Second) of Torts §892(2)).[4]

Second, the law is clear that the State may not maintain claims for nuisance and trespass against conduct authorized by state law. *See* 50 Okla. Stat. § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."); *Miller v. Mayor of New York*, 109 U.S. 385, 395 (1883); *Carson Harbor*, 270 F.3d at 870; *City of Columbus v. Union Pac. R.R.*, 137 F. 869, 872 (8th Cir. 1905); *Piggott v. Eblen*, 366 S.W.2d 192, 195-96 (Ark. 1963); *McKay v. City of Enid*, 109 P. 520, 521 (Okla. 1910) (authorization by the State to conduct a particular business or industry relieves the company "from liability to suit, civil or criminal, at the instance of the government"); *see also B.H. v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 805 (N.D. Okla. 2007) (private plaintiff, not government, may seek damages under a nuisance theory for conduct authorized by law) (citing *E. I. Du Pont De Nemours Powder Co. v. Dodson*, 1915 OK 256 150 P. 1085 (Okla. 1915)).[5] Similarly, the State may not pursue a trespass claim arising from conduct to which it consented. *See Butler v. Pollard*, 800 F.2d 223, 226 (10th Cir. 1986); *Antonio v. General Outdoor Advertising Co.*, 414 P.2d 289, 291 (Okla. 1966)); Restatement (Second) of Torts § 892A(1).

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[4] Under Oklahoma law, "agricultural activity" (including raising poultry) conducted on farm or ranch land and "undertaken in conformity" with applicable laws and regulations is "presumed to be [a] good agricultural practice and not adversely affecting the public health and safety." *See* 50 Okla. Stat. §§ 1; 1.1. Furthermore, such agricultural activity is "presumed to be reasonable and do[es] not constitute a nuisance" if "established prior to nearby nonagricultural activities…." *Id*. Compliance with the State's own laws, applicable here, therefore provides a particular protection against the State's nuisance claims.

[5] For detailed discussion of this point, *see* Dkt. No. 2033 at 17-20; Dkt. No. 2055 at 13-19; Dkt. No. 2231 at 6-7; Dkt. No. 2236 at 7-8.

Third, the AWMPs provide the regulated parties (and the Court) with information sufficient to know whether applying a certain amount of poultry litter on a particular field will cause pollution or is likely to cause pollution. The State sends a soil scientist to each field to design an AWMP that will prevent runoff of pollution to the waters of the State. Compliance with the soil scientists' instructions for that field establishes that litter applied consistent with the AWMP is not "placed" in a manner that is "likely to cause" pollution of the waters of the State in violation of 27A Okla. Stat. 2-6-105 or 2 Okla. Stat. § 2-16.

Finally, an AWMP provides instructions on how much poultry litter is appropriate and beneficial for each particular field while avoiding the risk of pollution. For the State's RCRA claim, the Court has asked the parties to assist in identifying the point at which poultry litter stops being a beneficial product and becomes a "waste" under RCRA. *See* Aug. 14, 2009 Hearing Tr. at 4:7-7:18 (Dkt. No. 2542); Aug. 18, 2009 Hearing Tr. at 5:7-6:11 (Dkt. No. 2548). The AWMPs provide a site-specific analysis by a qualified government official regarding how much poultry litter is a beneficial fertilizer on that property, while avoiding runoff of pollution. Accordingly, compliance with an AWMP's instructions defeats any claim that particular litter applications are the discarding of a "solid waste" or create a substantial endangerment under RCRA. *See Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2000); *Am. Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987).

In order to prevail on any of its claims then, the State must demonstrate that Defendants[6] have violated AWMPs in sufficiently large numbers to cause the harms the State alleges. The State bears the burden on this point. *See Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167, 1169 (10th Cir. 2004); *Carson Harbor*, 270 F.3d at 870 ("Because [plaintiff] failed to show that

[6] Or individuals under contract with Defendants if the Court concludes that Defendants are legally responsible for the actions of independent Contract Growers, which they are not.

the [utilities] violated the NPDES permits … any pollutants discharged into the storm water were permissible.").

B. Arkansas Authorizes the Land Application of Poultry Litter in Accordance with the Instructions and Application Rates Set Forth in Nutrient Management Plans (NMPs)

The State of Arkansas similarly authorizes the land application of poultry litter at specific rates, at specific times, and in specific locations through the issuance of Nutrient Management Plans ("NMPs") drafted, issued and approved by agents for the State of Arkansas. *See* Ark. Code Ann. § 15-20-902; Ark. Code Ann. § 15-20-1102; Ark. Code Ann. § 15-20-901, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; ANRC Reg. 2201.1, *et seq*; Dkt. No. 2033 Exs. 16-17 (Arkansas Nutrient Management Plans). Unlike Plaintiffs, Arkansas has nothing to gain in this case by disavowing its own regulations or suggesting that its own officials have failed to exercise good judgment and due care in creating these NMPs. Accordingly, as with Oklahoma's AWMPs, the evidence will show that Arkansas' NMPs are created to prevent runoff of nutrients from litter applications to the waters of the State, that farmers are authorized to carry out the NMP's field-specific instructions, and that farmers rely on them to comply with applicable federal, state, and local laws. These facts similarly undermine each of the State's claims to the extent they rely on evidence of litter applications made consistent with a state-issued AWMP or NMP.

C. The State Must Identify Evidence Proving that Each Defendant Is the "Cause-In-Fact" of the Alleged Harm

Causation is a necessary element of each of Plaintiffs' remaining tort and statutory claims. *See* PROSSER AND KEETON ON TORTS § 41 at 263 (5th ed. 1984); *Twyman v. GHK Corp.*, 93 P.3d 51, 54 n.4 (Okla. Civ. App. 2004) (tort law causation); *Angell v. Polaris Prod. Corp.*, 280 Fed. App. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008) (same); *City of St.*

Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 114 (Mo. 2007) (same); 42 U.S.C. § 6972(a)(1)(B) (RCRA causation); *Oklahoma v. Tyson Foods*, 565 F.3d 769, 776-79 (10th Cir. 2009) (same); *Opinion and Order*, Dkt. No. 1765 at 7 (Sept. 29, 2008) (Frizzel, J.) (same).[7] Causation requires evidence that each Defendant was both a cause-in-fact and proximate cause of each of the State's alleged injuries. It is important to note that the IRW is a million-acre watershed, and thus there cannot be a single undivided injury. Even if the State's claims are true, some creeks or streams may be injured while others are not. Thus, the State must demonstrate causation as to each particular injury for each particular Defendant. *See City of St. Louis*, 226 S.W.3d at 113-14.

The evidence at trial will not support a finding that each individual Defendant was a cause-in-fact and proximate cause of the complained-of injuries.[8] The State did not conduct a fate-and-transport study to link the bacteria and phosphorus which are generally found in the environment to poultry litter. Specifically, the evidence will not support the conclusion that nutrients or bacteria from litter applications attributable to individual Defendants reached the waters of the State in sufficient quantities to result in injury. The State's evidence attacks phosphorus generally, but does not track particular farms and fields to alleged contamination.

D. The State's Oklahoma Common Law and Statutory Claims (Counts 4, 6 and 7) Must Be Based Solely on Conduct Occurring in Oklahoma

This Court has ruled that the State of Oklahoma may not extend its laws beyond the political boundaries of the State.[9] Thus, conduct occurring in Arkansas is no basis for liability

[7] *See also* Dkt. No. 2069 at 16-21; Dkt. No. 2259 at 1-8.

[8] *See, e.g.*, Dkt. No. 2259 at 7-8 ¶¶14-18; *id.* at 16-21; *id.* at Joint Appendix ¶¶ I.(A)-(D), III.(A); IV.(B)-(C); V.(B)-(D); Dkt. No. 2259 at 1-8.

[9] *See* Sept. 15, 2009 Hearing (transcript not yet available); Aug. 18, 2009 Hearing Tr. at 100:13-101:16, 188:7-11 (Ex. A); June 15, 2007 Hearing Tr. at 16:22-17:14, 44:17-45:7 (Dkt. No. 2057 Ex. 38); Dkt. No. 1187; Dkt. No. 1202. As the Supreme Court has held, where a plaintiff alleges

under the State's Oklahoma-law claims (counts 4, 6 and 7).

Last week the State waived its right to a jury trial on its claim under 27A § 2-6-105(A) (Count 7) because the Court granted Defendants' motion to bifurcate and thus required the State to present the jury with proof based on activities occurring only in Oklahoma. The State could not proceed because it has not prepared Oklahoma-only evidence, but rather attacks the use of poultry litter generally. Although the State has waived its jury trial so that the presentation of proof would not be broken down into an Oklahoma-only presentation and an entire-IRW presentation, the State is still required to prove Counts 4, 6 and 7 with evidence of conduct occurring only in Oklahoma. The Court has repeatedly ruled that activities in Arkansas cannot sustain Oklahoma's state-law claims. *See, e.g.*, Aug. 18, 2009 Hrg. Tr. at 100:13 – 101:8; 188:7-11; June 15, 2007 Hrg. Tr. at 16:22-25. Evidence of conduct occurring in Arkansas is relevant only as to the State's claims under RCRA and federal common law.[10]

E. The State Cannot Extend Liability to Defendants Based on the Application of Poultry Litter by Growers who Contract with Defendants to Raise Poultry

Each of the State's claims attempts to hold Defendants legally responsible for the specific decisions about when, where, and how to apply poultry litter as a fertilizer. However, the

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that the discharge of pollutants from a "source state" causes injuries in a different "affected state," the Supreme Court has established that the trial court "must apply the law of the State in which the … source is located." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987); *Lane v. Champion Int'l Corp.*, 827 F. Supp. 701, 702 n.2 (S.D. Ala. 1993) (applying substantive law of the source state to all state common law claims, *including trespass*) (citing *Ouellette*, 479 U.S. at 501); *see also Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989) ("[T]he Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (internal quotations and ellipses omitted).

[10] The State may argue that conduct occurring in Arkansas is relevant to the State's nuisance and trespass claims as long as that conduct is evaluated under Arkansas law. However, Arkansas law expressly authorizes each application of poultry litter in the IRW. *See* Section I(B), *supra*. Moreover, Arkansas law provides that the complained-of conduct cannot be deemed a nuisance.

evidence will show that the vast majority of poultry farms in the IRW are not owned by Defendants, but by Contract Growers, and that Defendants do not land-apply poultry litter to any significant degree. Indeed, many Defendants do not land-apply poultry litter at all.

Because the small amount of litter directly handled by any Defendant (or all Defendants together) is insufficient to cause any of the alleged harms, the State will assert that the Contract Growers are not independent contractors, but are instead Defendants' employees or agents. Under the common law, "an independent contractor is one who engages to perform certain service for another, according to his own manner and method, free from control and direction of his employer in all matters connected with the performance of the service, except as to the result or product of the work." *Page v. Hardy*, 334 P.2d 782, 784 (Okla. 1958). The factors relevant to determining whether an individual is an independent contractor or an agent include:

> (a) the nature of the contract between the parties, whether written or oral; (b) the degree of control which, by the agreement, the employer may exercise on the details of the work or the independence enjoyed by the contractor or agent; (c) whether or not the one employed is engaged in a distinct occupation or business and whether he carries on such occupation or business for others; (d) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (e) the skill required in the particular occupation; (f) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (g) the length of time for which the person is employed; (h) the method of payment, whether by the time or by the job; (i) whether or not the work is a part of the regular business of the employer; (j) whether or not the parties believe they are creating the relationship of master and servant; and (k) the right of either to terminate the relationship without liability.

Id. at 784-85; *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

Each of these factors addresses whether Defendants control the Contract Grower's

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City of Columbus, 137 F. at 872; *Piggott*, 366 S.W.2d at 195-96; Ark. Code Ann. § 2-4-107(b); *see also* Ark. Code Ann. § 14-54-1502(b).

actions in the same manner that they would those of an employee. Critically, the courts have made clear that a principal cannot be held liable under a nuisance theory for the actions of an independent contractor unless the principal substantially controlled *the specific nuisance-causing activity*, as opposed to other activities, *at the time the nuisance occurs*. *See Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1026 (10th Cir. 2007) (nuisance requires control or substantially participation in the nuisance-causing activity); *State v. LIA*, 951 A.2d 428, 449 (R.I. 2008) ("A defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs.") (internal emphasis omitted); *In re Lead Paint Litig.*, 924 A.2d 484, 488-91 (N.J. 2007) (same). The rule is not limited to nuisance, but applies to the State's other claims. *See United States v. Aceto Ag. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) ("contributing to" liability under RCRA appropriate where defendant's control over the waste-disposing process could be inferred on the record); Restatement (Second) of Torts § 158 cmt. f (no trespass liability for person "whose presence on the land is not caused by any act of his own or by a failure on his part to perform a duty is not a trespasser"); 27A Okla. Stat. 2-6-105(A) ("It shall be unlawful for any person to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state."); *see also Bell v. Apache Supply Co.*, 780 S.W.2d 529, 530 (Ark. 1989) ("A person can be an agent for one purpose, but not for another.").

The evidence at trial will demonstrate that Defendants contract with poultry growers to raise poultry. All of the State's evidence of "control" will address issues relating to the quality of the birds that are raised—not to the use of poultry litter as a fertilizer. The evidence will show that Contract Growers own and manage their own farms and that many grow hay, raise cattle, or

are otherwise engaged in agricultural activities beyond raising poultry.[11] Defendants do not in any way control, contractually or otherwise, Contract Growers' work on their farms—including the utilization of their poultry litter by application, sale, barter, or export. Rather, the evidence will show that the only control Defendants exert over poultry litter is to mandate that, if Contract Growers elect to apply poultry litter to their own land, they must do so pursuant to a state-issued litter management plan.[12]

As an alternate theory to impose liability on Defendants for the actions of the Contract Growers, the State will cite Restatement (Second) of Torts § 427B. As an initial matter, however, the vicarious liability rule set out in § 427B has never been adopted in Oklahoma, Arkansas or federal common law. Accordingly, it does not provide the governing standard for any of the State's claims.

It is well settled in Oklahoma and Arkansas that principals are generally not liable for the actions of independent contractors. *See, e.g., Tankersley v. Webster*, 243 P. 745 (Okla. 1925);

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[11] Upon analyzing the contractual relationship between poultry companies and farmers, the Supreme Court and federal regulators have acknowledged the poultry farmers are independent contractors. *See e.g. National Broiler Marketing Association v. United States*, 436 U.S. 816, 821-22, 98 S. Ct. 2122 (1978) (noting that the petitioner poultry companies "contract with independent growers for the raising or grow-out of at least part and usually a substantial part, of their flocks… The [poultry company] then places its chicks with the independent grower for the grow-out period, provides the grower with feed, veterinary service, and necessary supplies, and, with its own employees, usually collects the mature chickens from the grower. Generally, the member retains title to the birds while they are in the care of the independent grower."); *Enterprises, Inc. v. NLRB*, 429 U.S. 298, 302 97 S. Ct. 576 (1977); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 116 S. Ct. 1396 (1996) (analyzing the relationship between a poultry company, chicken catchers and haulers, and poultry farmers, and referring to the latter as "independent contractors.").

[12] Significantly, courts have rejected the argument that control may be established from contractual provisions requiring compliance with applicable laws. *See Concrete Sales & Servs., Inc. v. Blue Bird Body*, 211 F.3d 1333, 1339 (11th Cir. 2000); *Jordan v. S. Wood Piedmont*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992).

Stoltze v. Ark. Valley Elec. Co-op Corp., 127 S.W.3d 466 (Ark. 2003). Section 427B provides a potential exception for any jurisdiction that adopts its provisions. Section 427B states that

> [o]ne who employs an independent contractor to do work which the employer knows or has reason to know to be *likely* to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

Restatement (Second) of Torts § 427B (emphasis added).

Neither the Oklahoma Supreme Court, the Oklahoma Court of Civil Appeals, the Arkansas Supreme Court, nor the Arkansas Court of Appeals has adopted Section 427B as controlling legal authority for any purpose, much less the circumstances similar to those in this lawsuit. Plaintiffs' principal Oklahoma authority on the issue of assigning an independent contractor's tort liability to an employer is *Tankersley v. Webster*, 243 P. 745 (Okla. 1925). But that case strongly suggests that Section 427B is not compatible with Oklahoma law. The plaintiff in *Tankersley* was injured after picking up and playing with a blasting cap left at a construction site. The plaintiff sued the general contractor, who defended arguing that responsibility lay with the independent subcontractor who had used the blasting caps in excavating the foundations for the new school building. *See id.* at 746-47. The court recognized and applied the general rule that a principal is not responsible for the conduct of the independent contractor. *See id.* at 747-48. However, the court noted a possible exception where "the performance of a specific job by an independent contractor in the ordinary mode of doing the work necessarily or naturally results in causing an injury." *Id.* at 747. Thus, it observed, had the plaintiff demonstrated that the excavation necessarily required the blasting, and had such required blasting caused the injury, then the outcome might have been different. *See id.* at 747-48. The rule the *Tankersley* court invoked is not the rule subsequently codified in Restatement § 427B, but rather is the "inherently dangerous activity" rule reflected in Restatement §§ 427 and

427A—something that "necessarily or naturally results in causing an injury." *Tankersley*, 243 P. at 747.[13] Section 427B proposes a much looser standard of vicarious liability pertaining to conduct merely "likely to" cause a trespass. *Tankersley* supplies no basis for adopting that rule.[14]

Plaintiffs similarly offer no basis for incorporating Section 427B into Arkansas law. Defendants have found no Arkansas case that discusses or applies Section 427B. As in Oklahoma, it is unlikely that Arkansas has or would adopt Section 427B's loose vicarious liability standard. Only just recently, in *Stoltze*, 127 S.W.3d 466, the Arkansas Supreme Court held that Arkansas has recognized three exceptions to the general rule that an principal is not responsible for the negligence of an independent contractor: (1) where the principal is negligent in hiring the contractor; (2) where the principal negligently fails to perform certain duties the principal has undertaken or performs them in a negligent manner; and (3) where the principal delegates to an independent contractor work that is inherently dangerous. *See id.* at 470. None of these exceptions apply to the facts of the case at bar.

Most importantly, however, even if Restatement § 427B were the law in Oklahoma, Arkansas, or the federal common law, the evidence will demonstrate that its vicarious liability principles are inapplicable in this case. Section 427B focuses on situations where the employer

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[13] Section 427 provides that a principal who "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Section 427A provides a similar rule, that a principal who "employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity." Restatement (Second) of Torts §§ 427 & 427A.

[14] Plaintiffs rely on Judge Eagan's vacated opinion in *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (vacated), but as they themselves acknowledge, that opinion

knows or has reason to know that the independent contractor's work is likely to involve the creation of a nuisance. *Id.* The evidence at trial will show that Defendants do not know that following the AWMPs and NMPs issued by the state is likely to involve the creation of a nuisance. To the contrary, the evidence will show that Defendants have long worked to ensure that growers follow the provisions of AWMPs and NMPs precisely because the instructions in those plans provide the best information on how to use poultry litter as a fertilizer without causing risk to the environment.

Finally, as this Court has ruled, these principles of vicarious liability *at most* extend potential liability to the actions of third parties with whom the Defendants have a contract. *See* Rest. (Second) of Torts, §427B (referring to the actions of contractors). As the Court has held, these vicarious liability principles do not extend potential liability to the actions of other third parties (such as cattlemen or hay growers) who buy or barter poultry litter on the open market. The evidence will show that more than half of all the poultry litter that is utilized in the IRW is land-applied by such third parties who have no relationship with Defendants. That poultry litter has no relevance to the State's claims in this case.[15]

II. The State's Specific Claims

A. Count 3 – RCRA

The State has pled a citizen-suit claim under 42 U.S.C. § 6972(a). Such a claim requires the State to prove that each Defendant is (1) "a person;" (2) that "contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid … waste;"

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lacks any precedential value.

[15] The State has filed a motion asking the Court to reconsider its decision that Defendants cannot be liable for the poultry litter decisions of third parties not under contract with Defendants. *See* Dkt. No. 2623. Among other arguments, the State seeks to import common law principles of vicarious liability into Oklahoma's anti-pollution statutes, and then expand that vicarious liability

and (3) "that such waste may present an imminent and substantial endangerment to health or the environment." *Burlington N.*, 505 F.3d at 1019-20.

1. Poultry Litter Is Not a "Solid Waste" as Defined By RCRA and Does Not Create an Imminent and Substantial Endangerment

The key question under the State's RCRA claim is whether poultry litter is a "solid waste" as that term is defined in RCRA. *See* 42 U.S.C. § 6903(27). Specifically, RCRA "solid waste" includes "material … from … agricultural operations" such as poultry litter to the extent that it is "garbage, refuse," [or] other discarded material." *Id.* [M]aterial is "discarded" when it is "disposed of," "thrown away," or "abandoned." *Am. Petroleum Inst.*, 216 F.3d at 55-56; *Am. Mining Congress*, 824 F.2d at 1179; *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 481 (D. Minn. 1995); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). Animal manures, such as poultry litter, that are bought, sold, and beneficially applied as fertilizer or soil conditioner are not "discarded" within the meaning of RCRA. *See Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004); *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003); *see also* H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (animal manures applied as fertilizer are not RCRA solid waste).

This Court has ruled that poultry litter is not *per se* exempted from RCRA citizen suits, and that at some point an individual might apply too much poultry litter to a field, such that the application is no longer a fertilizer and becomes a waste. *See* Aug. 14, 2009 Hearing Tr. at 4:7-7:18 (Dkt. No. 2542); Aug. 18, 2009 Hearing Tr. at 5:7-6:11 (Dkt. No. 2548). The Court has indicated that the standard for determining the breaking point between fertilizer and "waste" is to be determined at trial. *Id.* In determining whether a particular material is a beneficial product or a waste in a specific application, other courts have looked to the intent of the party using the

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beyond what the common law will allow. *Id.* Defendants will file a response to the State's

material (*i.e.*, whether they meant to throw the material away or put it to a beneficial use), whether the material has market value, and whether the material has at least an incidental beneficial effect in its usage. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) ("market valuation and management practices" are among the "reasonable tool[s] for distinguishing products from wastes"); *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club*, 2005 U.S. Dist. LEXIS 11699 at *18 (D. Conn. June 14, 2005) (bullet fired from gun is not "discarded" (even though it falls into the environment and has a polluting effect) because the shooter "is putting the lead bullet to its intended use"); *No Spray Coalition v. City of New York*, 2000 WL 1401458, at *3 (S.D.N.Y. Sept. 25, 2000) (pesticide not discarded despite being sprayed across the landscape (and thereby causing pollution) because it is put to its intended and useful purpose); *see also Safe Air For Everyone* ["*SAFE"*] *v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) ("In enacting RCRA, Congress also declared that agricultural products that could be recycled or reused as fertilizers were not its concern."). Whether or not the material has an environmental impact is not part of this analysis, which focuses solely on whether the material is a "waste" and not on the effect of using the material. *See Meyer*, 373 F.3d at 1046 n.13 ("[W]hether grass residue has been 'discarded' is [determined] independently of *how* the materials are handled" including whether that handling allegedly causes pollution.); *Metacon Gun Club*, 2005 U.S. Dist. LEXIS 11699 at *18; *No Spray Coalition*, 2000 WL 1401458 at *3; *see also Otay Land Co. v. U.E. Ltd.*, 440 F. Supp. 2d 1152, 1179-80 (S.D. Cal. 2006) (munitions used for their intended purpose are not discarded); *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, 1996 W.L. 131863, at *8 (S.D.N.Y. Mar. 22, 1996) (same).

A second question under RCRA is whether the application of litter creates a "substantial endangerment to health or the environment. *See* 42 U.S.C. § 6972(a)(1)(B); *Burlington N. &*

Motion for Reconsideration addressing those arguments.

Santa Fe Ry v. Grant, 505 F.3d 1013, 1021 (10th Cir. 2007). RCRA does not reach any conceivable risk but rather only those that are "substantial" or "serious. 42 U.S.C. § 6972(a)(1)(B); *Burlington N.*, 505 F.3d at 1021.

The evidence at trial will demonstrate that poultry litter is not a RCRA solid waste and does not create a substantial endangerment to health or the environment. First, the evidence will show that poultry litter is applied in the IRW consistent with AWMPs and NMPs that are developed by state regulators for the express purpose of maximizing the agricultural and economic value of poultry litter while minimizing any impact on the environment. *See* Ark. Code Ann. §§ 15-20-902 (1),(2) ("Litter provides nutrients that are beneficial to plant growth; The proper utilization of litter allows the addition of nutrients to the soil at a low cost."); Ark. Code Ann. § 15-20-1102 (enacting litter regulations to "regulate the utilization of poultry litter to protect the area while maintaining soil fertility"); Okla. Admin. Code § 35:17-5-1 (enacting litter regulations to "assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma"); *see also supra*, § I(A). Specifically, the Oklahoma and Arkansas officials who develop waste management plans are required by statute to develop plans that will minimize or prevent runoff of nutrients from fields where the litter is applied. *See supra*, § I(A). The evidence will therefore demonstrate that litter applied consistent with such a plan is not discarded but rather is beneficially used, and therefore is not a RCRA solid waste.

This same evidence will demonstrate that poultry litter does not pose a substantial endangerment to the environment. Again, the proof will be that AWMPs are scientifically developed specifically to minimize the runoff of nutrients from land-applied poultry litter. These plans, consistent with state laws and federal guidance, impose numerous restrictions on the application of litter. As the evidence will show, these plans take into account numerous field-specific considerations such as soil depth, slope, and proximity to water in establishing a litter

application rate that is appropriate for individual fields. Compliance with such a plan, therefore, does not endanger the environment.

Moreover, the evidence will demonstrate that bacteria in surface and groundwaters cannot be traced to applications of poultry litter on fields miles away. Intestinal bacteria are highly vulnerable to changes in temperature, acidity, UV radiation, desiccation, predation, and other environmental conditions and can die in as little as a few hours. Unlike bacteria from other sources, bacteria in poultry feces are deposited in enclosed growing houses away from any waters. Poultry litter sits in those houses for weeks or months, where bacteria die. When the litter is removed, it is land applied only when rain is not expected, and even then only a distance from streams or sinkholes. For these and other reasons, bacteria from poultry are highly unlikely to pose a substantial endangerment to individuals in the IRW.

B. Counts 4 & 5 – Oklahoma State Law Nuisance and Federal Common Law Nuisance

The State asserts nuisance claims under both theories of public nuisance and nuisance *per se* under Oklahoma law, and public nuisance under federal common law. Under Oklahoma law, a nuisance "is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another." *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985). Accordingly, to demonstrate a nuisance, the State must prove that each Defendant (1) unlawfully performed an act, or omitted to perform a duty; and (2) that this act or omission either: (a) annoys, injures or endangers the comfort, repose, health, or safety of others; (b) offends decency; (c) unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or (d) in any way renders other persons insecure in life, or in the use of property. 50 Okla. Stat. § 1. Oklahoma's nuisance law does not apply to preexisting agricultural activities. *Id.*

A public nuisance must affect a broad class of the public simultaneously. *See* 50 Okla. Stat. § 2; Restatement (Second) of Torts § 821B (a public nuisance is "an unreasonable interference with a right common to the general public").

A nuisance *per se* "is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n.6 (Okla. 1991); *see McPherson v. First Presbyterian Church*, 248 P. 561, 564 (Okla. 1926) (same).[16] Conversely, a nuisance *per accidens* is "an act, occupation or structure which is not a nuisance *per se* but which may become a nuisance by virtue of the circumstances, location or surroundings." *Id.*; *see British-Am. Oil Prod. Co. v. McClain*, 126 P.2d 530, 532-33 (Okla. 1942); *Bryson v. Ellsworth*, 200 S.W.2d 504, 505 (Ark. 1947).

The State claims that each and every application of poultry litter is a nuisance, and therefore the use of poultry litter is both a public nuisance and a nuisance *per se*. The evidence at trial will demonstrate that the land application of poultry litter is *not* a nuisance. As noted above, poultry litter is a safe and effective fertilizer. The evidence will show that it is used in compliance with management plans promulgated by the States of Oklahoma and Arkansas. These plans prevent any suggestion that each and every application of poultry litter results in a nuisance. *See supra*, § I(A). Moreover, even if the AWMPs did not exist, it is simply nonsensical to suggest that each and every application of fertilizer in a million-acre watershed is a nuisance given the wide array of circumstances in which litter would be utilized. Because of the varying characteristics of the fields where litter is applied, the evidence will show that the use of poultry litter cannot be a nuisance *per se* because it is not an act that is a nuisance at all times

[16] The State's claims alleging the existence of a statutory nuisance *per se* pursuant to 2 Okla. Stat. § 2-18.1(A) and 27A Okla. Stat. § 2-6-105(A) are set forth in Count 7. The State's claim of nuisance *per se* in Count 4 is therefore limited to consideration of the common law doctrine of nuisance *per se*, as defined by *Sharp*.

and under any circumstances, regardless of the location and surroundings.

C. Count 6 – Oklahoma Common Law Trespass

Common law trespass requires (i) a possessory interest in the property that has allegedly been invaded, and (ii) "actual and exclusive possession" of that property. *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1235 (D. N.M. 2004), *aff'd by* 467 F.3d 1223, 1248 n.36 (10th Cir. 2006). The evidence will show that the State cannot satisfy either element.

The State cannot demonstrate an exclusive interest in the waters of the IRW. Instead, the evidence will show that the Cherokee Nation and thousands of citizens hold rights and title in the waters in the Oklahoma portion of the IRW. The State will claim that the rights of these citizens should be ignored because the State is the sovereign, but it is well-established that the "sovereign" or "*parens patriae*" interest that the State alleges in the public waters at issue is insufficient to support a claim of trespass. *See* Dkt. No. 2055 at 8-13; Dkt. No. 2236 at 1-7; *see, e.g.*, *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1231-35 (D.N.M. 2004), *aff'd* 467 F.3d at 1248 n.36; *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087, *28, *35 (D.V.I. Oct. 31, 2008).

Prior to trial, the State consistently declined to allege a trespass claim based on private landowner interests in lieu of stating a "public-interest action" based solely on the State's sovereign interests in protecting "public water." *See* Dkt. No. 1917 at 17-18. The State's evidence at trial must be limited to the claims pleaded in the Second Amended Complaint and disclosed in discovery. *See* SAC ¶119; *see* Dkt. No. 1917 at 17-18; Dkt. No. 1917 at 17-18. Because trespass does not lie in the Tenth Circuit for the type of claim the State alleges, *New Mexico*, 335 F. Supp. 2d at 1231-35, *aff'd* 467 F.3d at 1248 n.36, the State's trespass claim must fail at trial.

D. Count 7 – 2 Okla. Stat. § 2-18.1(A) and 27A Okla. Stat. § 2-6-105(A)

Count 7 asserts violations of two general anti-pollution statutes, which impose liability on person(s) that "cause pollution" or "place or cause to be placed any wastes in a location where they are likely to cause pollution." 27A O.S. § 2-6-105; 2 O.S. § 2-18.1. The State contends that Defendants have violated these statutory provisions as a result of pollution purportedly caused by the land application of poultry litter as a fertilizer in the IRW. *See* SAC ¶¶47-68, 127-31. Plaintiffs request relief for these alleged violations pursuant to 27A O.S. § 2-3-504 and 2 O.S. § 2-16, respectively. See SAC ¶131.

In order to prevail under Count 7, the State must demonstrate that each Defendant has: (i) "cause[d] pollution of any waters of the state," 27A O.S. § 2-6-105(A); 2 O.S. § 2-18.1(A); or (ii) "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state," 27A O.S. § 2-6-105(A). The State will argue that *each and every* application of poultry litter results in pollution, even where applied in conformance with State-approved plans and regulations. The State will base this claim on the allegation that each and every application of poultry litter results in the release of phosphorous and bacteria into the IRW, and poultry litter is *always* placed in a location where these constituents may reach the waters of the State.[17]

By its terms, 27A O.S. § 2-6-105(A) only applies in circumstances in which there is proof that pollution came from a specific property on a specific day.[18] Accordingly, to prove a violation of that provision, the State must prove that, on a particular day at a particular location, the Defendant in question caused pollution of the waters of the state or caused wastes to be

[17] At oral argument on the Cherokee Nation's motion to intervene, the State clarified that its claims in this case are limited to waters running in definite streams, either above or below the surface. See Sept. 15, 2009 Hearing (transcript not yet available).

placed in a location where they are likely to cause pollution of any waters of the state.

It is insufficient for the State to show that poultry litter (or constituents of poultry litter) ran off of one or more fields. Rather, the term "pollution" is statutorily defined and contains a requirement that a sufficient amount of the alleged pollutant escape a particular field on a particular day and make its way to the waters of the state to create a nuisance. This volume requirement is set out in 27A Okla. Stat. 2-1-102(12), which states that:

> "Pollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any … substance into the environment *in quantities which are or will likely create a nuisance* or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property.

Id. (emphasis added). In this case, the State claims that the substances from poultry litter that are causing pollution are phosphorus and bacteria.

In addition to these requirements, the State must show that the poultry litter that was applied to the particular field on a particular day was not fertilizer but "waste." By its terms, 27A O.S. § 2-6-105(A) addresses the placing of "wastes" in a location where they cause pollution or are likely to cause pollution. Under § 2-6-105(A) the term "waste" can include material from agriculture, *see* 27A O.S. § 2-6-101, but of course not all materials used in agriculture are wastes. If a farmer purchased commercial chemical fertilizer and applied it to his crops, § 2-6-105(A) would not apply because the fertilizer is not a "waste." The same analysis is true with regard to poultry litter.

The statutory requirement that the State show the placement of "waste" under § 2-6-

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[18] 27A Okla. Stat. § 2-6-105(A); 27A Okla. Stat. § 2-3-504.

105(A) is similar to RCRA's requirement that the State show that poultry litter is a "waste" and not a beneficial product. *See supra*, § II(A). Accordingly, the standard that the Court sets for determining whether each particular application of poultry litter is a "waste" should apply to both Count 3 and Count 7.

As noted above, that standard should rely on the field-specific litter application decisions included in the AWMPs and NMPs. This will harmonize Oklahoma's specific poultry litter regulations with Oklahoma's more general anti-pollution statutes. It is well settled that statutes should be interpreted in this manner. "Legislative acts are to be construed in such manner as to reconcile the different provisions and render them consistent and harmonious, and give intelligent effect to each.'" *Id.* (quoting *Eason Oil Co. v. Corp. Comm'n*, 535 P.2d 283, 286 (Okla. 1975). The State's argument that each and every application of poultry litter violates Oklahoma's general anti-pollution laws renders meaningless Oklahoma's more specific statutes and regulations governing the application of poultry litter. Under these circumstances, compliance with the specific requirements must be read to satisfy the general requirements. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotations, emphasis omitted). In other words, the way farmers and ranchers know they are not (i) "caus[ing] pollution of any waters of the state," 27A O.S. § 2-6-105(A); 2 O.S. § 2-18.1(A); or (ii) "place[ing] or cause[ing] to be placed any wastes in a location where they are likely to cause pollution," 27A O.S. § 2-6-105(A), is by following the plans the State of Oklahoma drafted for them, which say exactly how much poultry litter is appropriate to put on each specific field.

In sum, Oklahoma's general environmental statutes apply to the release of a "pollutant" or placement of a "waste." 27A O.S. §§ 2-6-101; 2-6-105(A). These statutes must be read

consistent with the intent of the legislature, *Russell*, 2009 WL 983541, at *5; *In re Estate of Jackson*, 194 P.3d 1269, 1273 (Okla. 2008), which is

> to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters *without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters*.

27A O.S. § 2-6-102 (emphasis added). The emphasized text makes clear that the provision of Oklahoma's general anti-pollution statutes require compliance with laws and regulations such as those governing poultry litter application, which represent the legislature's best judgment as to the appropriate balance between the agricultural and economic benefits of poultry litter and sound environmental protections. As the State itself indicated, its poultry litter laws (and the AWMPs written under those laws) "assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma." O.A.C. § 35:17-5-1.

Respectfully submitted,

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I certify that on the 22nd day of September, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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